SK B&T Pte Ltd v The owners of the ship or vessel 'Silver Moon' of Port Klang (No 4)

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-14–02 OF 2016
AZIZAH NAWAWI J
30 NOVEMBER 2016

Civil Procedure — Stay of proceedings — Pending arbitration — Plaintiff's application pursuant to s 10 of the Arbitration Act 2005 pending arbitration — Whether plaintiff had taken steps in proceedings — Arbitration Act 2005 s 10

The plaintiff and the defendant had entered into a time charter party ('the TCP') in which the defendant agreed to time charter its vessel known as 'SILVER MOON' ('the vessel') to the plaintiff. Nevertheless, due to the vessel being unseaworthy and still being off-hire by the defendant for more than seven days, the plaintiff terminated the TCP. Later on, the plaintiff applied for warrant of arrest against the vessel; and an ex parte order ('the order') to transfer the cargo owned by the plaintiff in the vessel ('the cargo') to another vessel known as 'MT WOOSHIN ACE', both of which were granted by the court. The plaintiff then issued a notice of arbitration which was served on the defendant on 24 March 2016. Subsequently, on 29 March 2016, the plaintiff filed an application for the vessel to be sold *pendente lite* and the same was allowed by the court. In the present application ('encl 70'), the plaintiff applied to stay the substantive proceedings of the merits of the action in rem pursuant to s 10 of the Arbitration Act 2005 pending arbitration in London, England. It was not disputed that there was an arbitration agreement in cl 67 of the TCP nonetheless, the defendant submitted that the plaintiff had taken steps in the proceedings ie by filing the application for the ex parte order and the sale pendente lite of the vessel; and as such had waived its right to refer the dispute between the parties to arbitration. The defendant also contended that the plaintiff had participated in the case management where trial direction was given.

Held, allowing encl 70 with costs:

(1) The only steps that amount to a step in the proceedings are steps taken to advance the substantive dispute in the action. In the present case, the substantive dispute would be the plaintiff's claim against the defendant for breach of the TCP and damages thereof. The plaintiff's application for an order to discharge the cargo was not a step in the proceedings as the plaintiff was the owner of the cargo and was entitled to deal with the cargo. The application had nothing to do with the issue of the breach of

the TCP. Further, the plaintiff's application for sale pendente lite of the vessel was also not related to the substantive issue of the breach of the TCP as the said application was made because the defendant did not offer any security for the release of the vessel (see paras 30–32).

(2) The trial directions given by the court were part of the administrative process to manage the case in the court. The compliance by the parties to the court's directions did not in any way constitute steps taken by the plaintiff to 'advance the dispute'. In addition, the plaintiff had never indicated an unequivocal intention to proceed with the suit and to abandon the right to refer the dispute to arbitration. The plaintiff had consistently maintained their position that they wanted to invoke the arbitration agreement and this was reaffirmed by the issuance of the notice of arbitration which was served to the defendant (see paras 33–34).

[Bahasa Malaysia summary

Plaintif dan defendan telah memasuki perjanjian carter masa ('PCM') di mana defendan bersetuju untuk carter masa kapalnya yang dikenali sebagai 'SILVER MOON' ('kapal') kepada plaintif. Walau bagaimanapun, akibat kapal tidak layak belayar dan masih dibaiki oleh defendan lebih daripada tujuh hari, plaintif menamatkan PCM tersebut. Kemudiannya, plaintif memohon untuk waran tahanan terhadap kapal tersebut; dan perintah ex parte ('perintah') untuk memindahkan kargo yang dimiliki oleh plaintif dalam kapal tersebut ('kargo') kepada kapal lain yang dikenali sebagai 'MT WOOSHIN ACE', yang mana kedua-duanya dibenarkan oleh mahkamah. Plaintif kemudiannya mengeluarkan notis timbang tara yang mana diserahkan ke atas defendan pada 24 Mac 2016. Kemudiannya, pada 29 Mac 2016, plaintif memfailkan permohonan untuk kapal dijual *pendente lite* dan ianya dibenarkan oleh mahkamah. Dalam permohonan ini ('lampiran 70'), plaintif memohon untuk menangguhkan prosiding substantif merit tindakan *in rem* berikutan s 10 Akta Timbang Tara 2005 di London, England. Adalah tidak dipertikaikan bahawa terdapat perjanjian timbang tara di dalam klausa 67 PCM tersebut, walau bagaimanapun, defendan berhujah bahawa plaintif telah mengambil langkah-langkah di dalam prosiding iaitu pemfailan permohonan untuk perintah ex parte dan jualan *pendente lite* kapal tersebut; dan dengan itu telah melepaskan haknya untuk merujuk pertikaian di antara pihak-pihak kepada timbang tara. Defendan juga berhujah bahawa plaintif telah mengambil bahagian dalam pengurusan kes di mana arahan perbicaraan diberikan.

Diputuskan, membenarkan lampiran 70 dengan kos:

(1) Satu-satunya langkah yang merupakan langkah di dalam prosiding adalah langkah-langkah yang diambil untuk mengemukakan pertikaian substantif dalam tindakan tersebut. Dalam kes ini, pertikaian substantif adalah tuntutan plaintif terhadap defendan bagi kemungkiran PCM dan

ganti rugi di dalamnya. Permohonan plaintif bagi perintah untuk melepaskan kargo bukan langkah di dalam prosiding kerana plaintif adalah pemilik kargo dan berhak untuk menguruskan kargo tersebut. Permohonan tersebut tidak kena mengena dengan isu kemungkiran PCM tersebut. Selanjutnya, permohonan plaintif untuk jualan *pendente lite* kapal tersebut juga tidak berkaitan kepada isu substantif kemungkiran PCM tersebut kerana permohonan tersebut adalah dibuat sebab defendan tidak menawarkan apa-apa jaminan bagi perlepasan kapal tersebut (lihat perenggan 30–32).

(2) Arahan perbicaraan yang diberikan oleh mahkamah adalah sebahagian daripada proses pentadbiran untuk menguruskan kes di mahkamah. Pematuhan oleh pihak-pihak kepada arahan mahkamah tidak dalam apa-apa cara pun membentuk langkah-langkah yang diambil oleh plaintif untuk 'advance the dispute'. Selanjutnya, plaintif tidak pernah menunjukkan niat jelas untuk meneruskan dengan tindakan dan untuk melepaskan hak untuk merujuk pertikaian tersebut kepada timbang tara. Plaintif dengan konsisten mengekalkan kedudukan mereka bahawa mereka hendak membangkitkan perjanjian timbang tara dan ini disahkan semula oleh pengeluaran notis timbang tara yang mana diserahkan kepada defendan (lihat perenggan 33–34).]

Notes

For a case on stay of proceedings pending arbitration, see 2(5) *Mallal's Digest* (5th Ed, 2015) para 8665.

Cases referred to

Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors [2012] 4 MLJ 573, CA (refd)

Gilgandra Marketing Co-operative Ltd v Australian Commodities & Marketing Pty Ltd [2010] NSWSC 1209, SC (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97, SC (refd)

Legislation referred to

Arbitration Act 2005 ss 10, 10(1), 11, 11(1)(e)
Courts of Judicature Act 1964 s 24(b)
Rules of Court 2012 O 70 rr 11, 20
Senior Courts Act 1981 [UK] ss 20(2)(h), 21(4)

J Joseph (Joseph & Partners) for the plaintiff.
S Ramesh (Rastam Singh & Co) for the defendant.

Azizah Nawawi J:

APPLICATION

[1] Enclosure 70 is an application filed by the plaintiff under s 10 of the Arbitration Act 2005 and/or under the inherent jurisdiction of this court for the following orders:

(a) that all substantive proceedings of the merits of this action in rem be stayed pursuant to s 10 of the Arbitration Act 2005 pending arbitration in London, England save for the execution of the sale *pendente lite* pursuant to O 70 r 20 of the Rules of Court 2012 in respect of the vessel 'SILVER MOON' (IMO No 8912675) of Port Klang lying under arrest under the custody of this court and/or in furtherance and/or consequential to the orders of court dated 3 May 2016 and 2 March 2016, being scurrility pending arbitration under s 11(1)(e) of the Arbitration Act 2005.

[2] The grounds of the application are as follows:

(a) that the present dispute is a matter subject to an arbitration clause contained in the time charter party dated 8 January 2016 ('TCP dated 8 January 2016'), which provides, inter alia, that all disputes arising in connection to the TCP dated 8 January 2016 shall be put to arbitration in London pursuant to the laws relating to arbitration there in force;

(b) that the applicability nor the validity of the arbitration clause in the TCP dated 8 January 2016 has not been challenged by either party. As such, the plaintiff has elected to have the dispute referred to arbitration. In so doing, the plaintiff have invoked the admiralty jurisdiction of the High Court in arresting the vessel as security for its claim yet to be decided in arbitration pursuant to s 11 of the Arbitration Act 2005 and the vessel was arrested on 18 February 2016;

(c) that pursuant to the arrest, the plaintiff has since commenced the procedures for the sale of the vessel;

(d) that the plaintiff has not taken any other steps in the proceedings in this action, including not having filed the statement of claim; and

(e) that the plaintiff has commenced the london arbitration proceedings by issuing the notice of arbitration dated 24 March 2016 to the defendant.

[3] Having considered the application and the submissions of the parties, this court has allowed the plaintiff's application in encl 70 with costs.

A THE SALIENT FACTS

[4] The plaintiff is a company incorporated in Singapore with its registered address at Raffles Place, Republic Plaza, Singapore.

B

[5] The defendant, Silverline Maritime Sdn Bhd, is the registered owner of the vessel, 'SILVER MOON'.

[6] The plaintiff and the defendant has entered into a time charter party on
C 8 January 2016 ('the TCP dated 8 January 2016'), whereby the defendant agreed to time charter the vessel to the plaintiff for a period of three months, with a further six months in charters option.

[7] The TCP dated 8 January 2016 included an arbitration clause which
D states as follows:

> Clause 67. Any and all differences and disputes whatsoever nature arising out of this charter *shall be put to arbitration in the city of London* pursuant to laws relating to arbitration there in force ...

E

[8] The plaintiff had purchased 4000 KL of Marine Gas Oil ('the cargo') from a company called Chemoil International Pte Ltd ('Chemoil International') on 12 January 2016 with the intended purpose of shipment on board the vessel, the 'SILVER MOON'.

F

[9] Upon loading a quantity of 3,942.069 KL cargo of MGO represented by bill of lading No BL-507710–019458 on board the vessel in the Port of Banyan, Singapore, the terminal issued an electronic bill of lading to the order of Chemoil International. The plaintiff paid for the cargo in full and the bill of
G lading was endorsed to the order of the plaintiff. Hence, the plaintiff is the owner of the cargo on board the vessel.

[10] The plaintiff then gave instructions to the defendant to head to the South Indian Ocean for cargo operations near Male, Maldives.

H

[11] Despite having received the said instructions from the plaintiff to sail directly to Male, Maldives, the vessel on 8 February 2016 deviated towards a port of refuge, Tanjung Pinang, Indonesia and eventually berthed at Johor Port to deal with multiple repair works including but not limited to, oil leakage
I from the cargo tanks specifically tanks 4S and 5S, seawater ingress to the cargo tank 6P (and other tanks yet to be identified), failure of the vessels generator, flooded cabin rooms (including the cooks cabin, oiler cabin and AB room) and damage to the vessel's hull owing to the port side lifeboat being in contact with the boat davit ('the defects').

[12] In view of the vessel being unseaworthy and as a result of being off-hire for more than seven days, the plaintiff contends that the defendant were in repudiatory breach of the TCP dated 8 January 2016. As such, the plaintiff issued a letter to the defendant, accepting the repudiatory breach and terminated the TCP dated 8 January 2016 with immediate effect on 15 February 2016.

[13] Vide an email dated 16 February 2016, the plaintiff, through their solicitors Hill Dickinson LLP, reiterating, among others, the termination of the TCP dated 8 January 2016 and demanding security in the sum of USD2m in the form of a bank guarantee.

[14] When the defendant did not provide the security, the plaintiff invoked the admiralty jurisdiction of this court pursuant to s 24(b) of the Courts of Judicature Act 1964 and ss 20(2)(h) and 21(4) of the Senior Courts Act 1981.

[15] The writ of summons was filed on 17 February 2016. On an application by the plaintiff, the warrant of arrest was issued against the vessel, 'SILVER MOON' on 17 February 2016.

[16] In a supplementary affidavit affirmed by Jeremy Joseph affirmed on 18 February 2016, for and on behalf of the plaintiff, the deponent states as follows in paras 3, 4, 5 and 6:

> 3. I make this affidavit in support of the Plaintiff's Writ in Rem dated 17.2.2016 and Affidavit to Lead to Warrant of Arrest affirmed by me on 17.2.2016.
>
> 4. The Plaintiff's action falls within the provisions of section 20(2)(h) and 21(4) of the Senior Court Act 1981 which enables SK B&T to enforce their claim in rem against the Vessel.
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> 5. As the Charterparty (cl 67) dated 8.1.2016 (CP) also provides for an arbitration dispute resolution clause, in which any disputes are to be settled in London, an arrest as security for any claim in a foreign arbitration is permissible under the relevant provisions of the Arbitration Act 2005 and the Arbitration Amendment Act 2011.
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> 6. Notwithstanding the arbitration clause incorporated in the CP and the commencement of London arbitration, I verily believe that this Honourable Court has the power to issue a Warrant of arrest by way of interim remedy to secure the Plaintiff's claim by arrest of the Vessel, pursuant to section 11(1)(e) of the Arbitration Act 2005 (as amended by section 5 Arbitration (Amendment) Act 2011). So far as the relevant arbitral powers are concerned, these are set out in Section 11 of the Arbitration Act 2005.

[17] On 19 February 2016, the plaintiff issued a demand for security to be furnished for the release of the vessel but defendant/owners failed to provide the security and the vessel continues to be under arrest by this court.

[18] As the defendant failed to agree or cooperate with the ship-to-ship transfer, the plaintiff applied for an ex parte order to transfer the cargo to the other vessel, MT 'WOOSHIN ACE'. The application (encl 14) is premised on O 70 r 11 of the ROC 2012 and s 11 of the Arbitration Act 2005.

[19] The order was granted on 23 February 2016, and pursuant to the said order, the discharge and transshipment operations were carried out and concluded on 27 February 2016. The cargo is now on the 'WOOSHIN ACE' and she sailed on 29 February 2016.

[20] The plaintiff then issued a notice of arbitration which was served on the defendant on 24 March 2016.

[21] On 29 March 2016, the plaintiff filed an application for the vessel to be sold *pendente lite* and the same was allowed by this court.

[22] On 31 May 2016, the plaintiff filed this application to stay the substantive proceedings of the merits of this action in rem pursuant to s 10 of the Arbitration Act 2005 pending arbitration in London, England

THE FINDINGS OF THE COURT

[23] The plaintiff's application for stay pending arbitration is premised on s 10(1) of the Arbitration Act 2005, which reads:

> A court before which proceedings are brought on respect of a matter which is the subject of an arbitration agreement, shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed.

[24] In the present case, there is no dispute that there is an arbitration agreement in cl 67 of the TCP dated 8 January 2016.

[25] There is also no allegation or evidence before this court that the arbitration agreement is null and void, inoperative, or incapable of being performed.

[26] However, the main issue raised by the defendant is that the plaintiff had taken steps in the proceedings and as such has waived its right to refer the dispute between the parties to arbitration. The defendant submits that the said steps in the proceeding taken by the plaintiff include the following actions:

(a) the ex parte application filed by the plaintiff dated 27 February 2016 for an order to discharge the cargo from 'SILVER MOON' to 'WOOSHIN ACE'; and

(b) the plaintiff's application for sale *pendente lite* of the vessel.

[27] In *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, the Supreme Court held:

> The view adopted by the Judge that the filing of the affidavits by the appellant seeking discharge of the interlocutory injunction and the taking of the preliminary objection before Anuar J constituted 'a step in the proceedings' is untenable.
>
> *Resisting an application for an interlocutory injunction by putting in evidence and appearing in court in the circumstances of this case cannot be taken as 'a step in the proceedings'. The conduct of the appellant did not in any way indicate an election to abandon its right to a stay and nor did it have the effect of invoking the jurisdiction of the court. The appellant had thus not taken a step in the proceedings ...* (Emphasis added.)

[28] In *Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLJ 573, the Court of Appeal held that an application to set aside the writ and the grant of leave to file a statement of defence are not steps taken in the proceedings that took away the right to refer to arbitration. The court held that:

> [14] Our s 10 is differently worded. But the principles are the same. *Whether an action amounts to a step in the proceedings is determined by the nature of the action and whether it indicates an unequivocal intention to proceed with the suit and to abandon the right to refer the dispute to arbitration.* An application is not a step in the proceedings, if it does not express the willingness of the defendant to go along with the determination of the court instead of arbitration. A defendant who is specifically stated in the application or supporting affidavit that he intends to seek a stay is not stopped from asserting his right to invoke arbitration. An application, which is made in the event that the specific application for stay is unsuccessful, is not a step in the proceedings. (Emphasis added.)

[29] In *Gilgandra Marketing Co-operative Ltd v Australian Commodities & Marketing Pty Ltd* [2010] NSWSC 1209, the court held that:

> The court held that a party is not necessarily barred from seeking a referral of the action to arbitration if it takes a step in judicial proceedings without invoking the arbitration agreement. *Only where that step amounts to a submission of a statement of substance of the dispute will the procedural requirement be engaged.* (Emphasis added.)

[30] Applying the above principles, the only steps that amount to a step in the proceedings are steps taken to advance the substantive dispute in the action. In the present case, the substantive dispute will be the plaintiff's claim against

the defendant for the breach of the TCP dated 8 January 2016 and damages for loss suffered by reason of the said breach.

[31] As such I am of the considered opinion that the plaintiff's application dated 27 February 2016 for an order to discharge the cargo from 'SILVER MOON' to 'WOOSHIN ACE' is not a step in the proceedings as the plaintiff is the owner of the cargo and is therefore entitled to deal with the cargo in order to secure the protection and preservation of the cargo and the plaintiff's rights over the same. The plaintiff's application dated 27 February 2016 has nothing to do with the issue of the breach of the TCP dated 8 January 2016.

[32] With regards to the plaintiff's application for sale *pendente lite* of the vessel, the same is also not related to the substantive issue of the breach of the TCP dated 8 January 2016. The said application was made because the defendant did not offer any security for the release of the vessel.

[33] On the defendant's contention that the plaintiff has participated in the case management where trial direction were given, I agree with the plaintiff that the trial directions given by court are part of the administrative process to manage the case in court. The compliance by the parties to the court's directions does not in any way constitute steps taken by the plaintiff to 'advance the dispute'.

[34] Added to that, I am of the considered opinion that the plaintiff has never indicated an unequivocal intention to proceed with the suit and to abandon the right to refer the dispute to arbitration. From the filing of the affidavit affirmed by Jeremy Joseph on 18 February 2016, the plaintiff has consistently maintained their position that they wanted to invoke the arbitration agreement to have their dispute settled by arbitration in London. This is reaffirmed by the issuance of the notice of arbitration which was served on the defendant on 24 March 2016.

CONCLUSION

[35] Premised on the reasons enumerated above, I am of the considered opinion that there is merit in this application and the same is allowed with costs.

Enclosure 70 allowed with costs.

Reported by Dzulqarnain Ab Fatar